

SINCLAIR BROADCAST GROUP, INC. *

IN THE

Plaintiff

*

CIRCUIT COURT

v.

*

FOR

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS

*

BALTIMORE CITY

Defendant

*

Case No.: 24-C-17-006516

* * * * *

ORDER

Pending before this Court is Sinclair Broadcast Group, Inc.'s (hereinafter "Plaintiff") Complaint for Improper Denial of Access to Records against Baltimore City Board of School Commissioners (hereinafter "Defendant"). The parties appeared for trial on February 11, 2019.

I. Factual Background and Procedural History

Pursuant to the Baltimore City Public Schools' Operating Budget for the school year 2017-2018, adopted by the Baltimore City Board of School Commissioners (BCBSC), its mission was to provide "excellence in education for every child at every level by focusing on quality instruction, managing systems efficiently, and sustaining a culture of excellence."¹ In accordance with its mission, Baltimore City Schools' Operating Budget provided the following vision, "every student will graduate ready to achieve excellence in higher education and the global workforce."² Despite these utopic projections for Baltimore City Schools, as well as the influx of funding, students have failed to flourish academically. According to The National Assessment of Educational Progress (NAEP), as indicated in The Nation's Report Card, the vast majority of Baltimore City Schools' students are performing below proficient. With reports as recent as

¹ BALTIMORE CITY PUBLIC SCHOOLS OPERATING BUDGET FOR 2017-2018 (May 23, 2017), available at <https://www.baltimorecityschools.org/sites/default/files/inline-files/Budget-FY18OperatingBudget-English.pdf>.

² *Id.*

2017, the NAEP recorded that only 11% of eighth grade students are performing at or above proficient in mathematics and 13% are performing at or above proficient in reading.³ The glaring discrepancy between funding devoted to City Schools and the aggregate number of students performing below proficient has generated concerns among the Baltimore City public and media.

In response to growing concerns regarding the quality of public education in Baltimore City, Plaintiff launched an investigation into Baltimore City Public Schools, referred to as “Project Baltimore.” Plaintiff owns and operates a Fox-affiliated television station, known as Fox 45, whose reporters spearheaded the Project Baltimore efforts. Project Baltimore, led by reporter Chris Papst, began investigating allegations that Baltimore City Public Schools were systematically promoting unqualified students and whether teachers, administrators, and/or principals had changed students’ failing grades to passing grades.

On September 5, 2017, Mr. Papst sent Defendant a Maryland Public Information Act (hereinafter “MPIA”) request (hereinafter “September 5th Request”) stating, in relevant part:

“Under the Maryland Public Information Act, Fox 45 in Baltimore, MD is requesting any and all documentation collected or created by Baltimore City Public Schools concerning grade changing reports/allegations/investigations made since 2010. In this request, we are seeking—for example—the initial claim, response to that claim, paperwork/documents gathered via the investigation, and any result or follow up information related to that claim. Please include any pending claims/claims not yet resolved.”

On October 5, 2017, Defendant denied Plaintiff’s September 5th Request (hereinafter “October 5th Denial”), citing various exceptions to the MPIA that either prohibited the production of such materials, or allowed Defendant to deny Plaintiff’s request for such materials. The October 5th Denial states, “Your request for investigation reports and associated documents is being denied on multiple grounds.” Defendant enumerates the grounds as follows:

³ THE NATION’S REPORT CARD, Baltimore City, available at <https://www.nationsreportcard.gov/>. (NAEP is a “congressionally mandated project administered by the National Center for Education Statistics (NCES), within the U.S. Department of Education and the Institute of Education Sciences (IES)”).

Records related to currently ongoing investigations are personnel records pertaining to the individual employees identified within the records. Pursuant to §4-311, the custodian is prohibited from disclosing these records to Fox 45, which is not a person in interest as defined by the Act. (citations redacted). Additionally, your request is being denied because the custodian has determined that releasing any of the reports would be contrary to the public interest. §4-343. First, the investigatory reports are intra-agency documents that are protected by the deliberative process privilege. §4-344. This exemption protects the internal decision making process of a government agency. (citations redacted). Second, the investigatory records were prepared in anticipation that administrative disciplinary proceedings might be taken against individual employee. As such, §4-351 provides that the custodian may deny inspection of the investigatory records. (citations redacted). To release the records to Fox 45, which is not a person in interest as defined by the Act, would be contrary to the public interest for several additional reasons, including release of the records could deprive specific individuals of a fair and impartial hearing, release would have a chilling effect on future investigations and would also have a detrimental impact on future investigations because investigative techniques and procedures would be disclosed. Lastly, your request is being denied because the records are protected by the attorney work product doctrine. §4-301. (citations redacted).

On November 10, 2017, Plaintiff submitted a second MPIA Request (hereinafter “November 10th Request”), requesting “any and all documentation collected or created by Baltimore City Public Schools concerning the 2017 investigation into allegations of grade changing at Northwood Appold Community Academy II, or NACA II. In this request we are seeking the complete report in its entirety...the report may need to be redacted to exclude names of teachers, investigators, administrators, students or any other personnel involved in the internal investigation.” On November 28, 2017, despite Plaintiff’s attempt to narrow the scope of its investigation to Northwood, Defendant denied Plaintiff’s request (hereinafter “November 28th Denial”). Defendant provided a nearly identical letter citing the same exemptions to disclosure, while making slight amendments to address Northwood Appold Community Academy II, or NACA II, specifically. Defendant claimed that “Pursuant to §4-311, the custodian is prohibited from disclosing the record, even if redacted, to Fox 45 which is not a person in interest...” (citations redacted). Following the issuance of both Denials, Defendant did not produce any

relevant documents. As a result, Plaintiff hired counsel and filed a Complaint in the Circuit Court for Baltimore City against Defendant.

Following Plaintiff's Complaint filed on December 20, 2017, and during the course of litigation, Defendant produced numerous series of documents. On February 23, 2018, Defendant produced 73 pages of redacted documents. On March 1, 2018, Defendant produced 2 pages of the same documents produced prior, but with fewer redactions. On July 3, 2018, Defendant produced its first Vaughn Index, totaling 21 pages. On October 15, 2018, Defendant produced its second Vaughn Index, totaling 143 pages. On October 15, 2018, Defendant produced 1,021 pages of redacted documents. On December 14, 2018, Defendant produced its third Vaughn Index, totaling 49 pages. On December 14, 2018, Defendant produced 9,977 pages of redacted documents. The following is a recitation of the relevant procedural history, excluding the aforementioned productions of documents provided by Defendant.

On December 20, 2017, Plaintiff filed a Complaint with one count: Improper Denial of Access of Records. Within the Complaint, Plaintiff requested that the Court enjoin Defendant from withholding records relating to grade changing allegations; that the Court enter an order requiring Defendant to produce, and allow Plaintiff to inspect and copy, records relating to the grade changing allegations; and that the Court award attorney's fees and costs. On January 22, 2018, Defendant filed an Answer to Complaint, Defendant's Memorandum in Response to Complaint Seeking Judicial Review, and Discovery Responses. On January 26, 2018, Judge Michael Pierson issued a Scheduling Order with an anticipated trial date of January 16, 2019. On February 1, 2018, Defendant filed a Request for Immediate Hearing. On February 27, 2018, Plaintiff filed a Response to Defendant's Request for Immediate Hearing. On April 9, 2018, Defendant filed an Amended Response to Plaintiff's First Set of Interrogatories and First

Request for Production of Documents. On May 3, 2018, Plaintiff filed a Motion to Compel Discovery and Motion to Strike or Overrule Untimely Discovery Responses and Incorporated Memorandum of Law. On May 8, 2018, Defendant filed a Counterclaim for Declaratory Relief and Request for Hearing. On May 22, 2018, Defendant filed a Response to Motion to Compel Discovery in a Judicial Review.

On June 4, 2018, Plaintiff filed a Motion to Compel Defendant to Produce Vaughn Index and Incorporated Memorandum of Law, and a Motion to Dismiss Counterclaim with Incorporated Memorandum of Law and Request for Hearing. On June 11, 2018, Plaintiff filed an Agreed Request for Scheduling Conference. On June 22, 2018, Defendant filed a Response to Motion to Compel Defendant to Produce a Vaughn Index. On June 22, 2018, a Civil Postponement was approved. On June 27, 2018, Judge Lawrence Fletcher-Hill ordered that the hearing scheduled for July 16, 2018 be postponed to August 22, 2018. On June 28, 2018, Plaintiff filed an Amended Complaint. On July 3, 2018, Defendant filed a Response to Plaintiff's Motion to Dismiss Counterclaim for Declaratory Relief. On July 3, 2018, Defendant filed a Motion for Summary Judgment Relating to Plaintiff's Complaint Seeking Judicial Review. On July 31, 2018, Plaintiff filed Response/Opposition to Motion for Summary Judgment and Cross Motion for Summary Judgment with Incorporated Memorandum of Law. On August 20, 2018, Defendant filed a Reply to Plaintiff's Response in Opposition of Defendant's Motion for Summary Judgment and Response to Plaintiff's Cross Motion for Summary Judgment.

On August 28, 2018, Judge Barry Williams ordered that Plaintiff's Motion to Compel Defendant to Produce Vaughn Index is granted; Plaintiff's Motion to Dismiss Counterclaim is granted; Defendant's Motion for Summary Judgment is denied; and Plaintiff's Cross Motion for Summary Judgment is denied. Judge Williams ordered that Defendant produce a more

comprehensive Vaughn Index, and shall identify, at a minimum: (1) investigative records; (2) investigative techniques; and (3) documents containing allegations of improper grade changing by teachers or administrators. On September 27, 2018, Plaintiff filed a Motion to Modify the Pretrial Scheduling Order. On October 26, 2018, Defendant filed a Notice of Production of Defendant's Vaughn Index and Requested Public Information Records. On November 1, 2018, Defendant filed a Response to Plaintiff's Motion to Modify Scheduling Order. On December 3, 2018, Judge Fletcher-Hill ordered that Defendant's Motion to Modify Scheduling Order is granted. On December 10, 2018, Judge Fletcher-Hill issued an Order Postponing Trial to February 11, 2019. On December 14, 2018, Defendant filed a Supplemental Affidavit of Sally A. Robinson with Exhibits. On December 17, 2018, a deposition was taken of Sally A. Robinson. On January 31, 2019, Plaintiff filed a Motion to Compel Deposition Answers to Sally A. Robinson with Incorporated Memorandum of Law and Exhibits. On February 7, 2019, Defendant filed a Motion to Quash Subpoena and Request for a Hearing; Defendant's Motion was never received by this Court. On February 8, 2019, Plaintiff filed Plaintiff's Response in Opposition to Defendant's Motion to Quash Subpoena and Request for a Hearing; Plaintiff's Response was received by this Court only through a courtesy copy. On February 11, 2019, the parties appeared for trial before this Court.

On February 11, 2019, the parties appeared for trial and argued the following pretrial motions: (1) Renewed Motion for Summary Judgment; and (2) Defendant's Motion to Quash Subpoena for Sally Robinson and Shashi Buddula. Additionally, the parties requested a ruling as to whether Sally A. Robinson would be acting as a witness or an advocate in the matter. Both the Plaintiff and the Defendant made oral Motions for Summary Judgment, and the Court denied both Motions. Next, the Defendant argued its Motion to Quash Subpoena, as well as Plaintiff's

Response in Opposition to Defendant's Motion to Quash Subpoena. Defendant contends that it filed its Motion on February 7, 2019, but this Court was not provided with a copy of the Motion prior to trial, nor was the Court provided a copy on the morning of trial. The Court did receive Plaintiff's Response in Opposition to Defendant's Motion to Quash Subpoena, via courtesy copy to chambers, on February 8, 2019. The Court found that Sally A. Robinson was a critical witness in establishing the steps that Defendant took in collecting relevant documents pursuant to Plaintiff's two MPIA Requests, and Shashi Buddula, the Chief Information Technology Officer Interim, could provide relevant testimony regarding the storage and collection of emails. The Court also ruled, pursuant to Maryland Rule 19-303.7, that Sally A. Robinson was a necessary witness in this case and therefore could not serve the dual purpose of acting as an advocate on behalf of the Defense. The Rule states, "An attorney shall not act as an advocate at a trial in which the attorney is likely to be a necessary witness..." Md. Rule 19-303.7(a).

Following the aforementioned pretrial rulings, the parties delivered opening statements. Plaintiff argued this case has critical importance to the public because it involves the carrying out of education, and addresses the welfare of children enrolled in Baltimore City Public Schools. Further, Plaintiff contended that relevant documents should have been produced from the inception of the MPIA Requests, and Defendant's searches for such documents should not have been limited solely to the Office of Staff Investigations. Plaintiff proffered that Defendant had produced zero documents following the MPIA Requests, had failed to place litigation holds on any documents or emails, and provided documents redacted in their totality. In response, Defendant proffered that Plaintiff's initial MPIA Request is at issue, but it only requested claims and investigations. Defendant contended that Plaintiff has received all of the relevant documents

pursuant to its MPIA Request because Plaintiff never specifically requested emails in its Request. Following opening statements, the Plaintiff called its first witness.

First, Plaintiff called Chris Papst in its case-in-chief. Mr. Papst graduated from the University of Pittsburgh with a Bachelor of Arts degree, and received a Master of Arts degree from Temple University. Mr. Papst is a reporter with Fox 45, operated by Sinclair Broadcast Group, where he has been employed for 5-6 years. In furtherance of his employment with Fox 45, Mr. Papst began working on a long term investigative project known as "Project Baltimore," aimed to focus on public school education in the Baltimore area including, but not limited to, finances, test scoring, bullying, and teacher credentials. Mr. Papst provided that Maryland state-wide proficiency scores are up to three and a half times higher than the proficiency scores in Baltimore City public schools. For example, students in Baltimore City schools scored a 15% proficiency in math and English. Further, NACA II's students scored a 0% proficiency in math in 2017.

In the course of reporting for Project Baltimore, Mr. Papst testified that he learned of grade changing allegations raised by teachers that indicated students had received grades that the teachers had not assigned to them. As a result of this information, Mr. Papst sent his initial MPIA Request to Defendant, dated September 5, 2017, requesting documentation concerning grade changing reports, allegations, and investigations since 2010. *See* Plaintiff's Exhibit 1. In response, Mr. Papst indicated that Defendant sent a letter, dated October 5, 2017, denying his first MPIA request, citing numerous exemptions from disclosure. Defendant did not offer to provide any relevant documentation. *See* Plaintiff's Exhibit 2. Consequently, Mr. Papst sent a second MPIA Request, dated November 10, 2017, seeking documentation of investigations concerning Northwood Appold Community Academy II, or NACA II. *See* Plaintiff's Exhibit 3. In response, Defendant provided another letter, dated November 28, 2017, with nearly verbatim

citations to exemptions, and again did not offer to produce any documentation. *See* Plaintiff's Exhibit 4.

During Mr. Papst's testimony, Plaintiff's counsel inquired into the language Mr. Papst used in his initial MPIA Request. The September 5th Request reads,

Under the Maryland Public Information Act, Fox 45 in Baltimore, MD is requesting any and all documentation collected or created by Baltimore City Public Schools concerning grade changing reports/allegations/investigations made since 2010. In this request, we are seeking—for example—the initial claim, response to that claim, paperwork/documents gathered via the investigation, and any result or follow up information related to that claim. Please include any pending claims/claims not yet resolved.

See Plaintiff's Exhibit 1.

Mr. Papst testified that by "any and all," he meant anything related to grade changing allegations, including, but not limited to, correspondence and emails. Mr. Papst also testified that "concerning" was intended to mean anything involving allegations of grade changing. Once both MPIA Requests were denied and Defendant produced no documents in response to the Requests, Mr. Papst retained counsel to challenge Defendant's decision to withhold documents. After Plaintiff filed its lawsuit on December 20, 2017, Mr. Papst testified that Defendant provided redacted documents with dates ranging from 2012 to 2017. *See* Plaintiff's Exhibit 5. Within the initial production, Mr. Papst received pages redacted in their totality. *See* Exhibit 5, Tab C. Notably, on March 1, 2018, in the second production of documents, Mr. Papst received the same documents with fewer redactions. *See* Plaintiff's Exhibit 6. Through the course of litigation, Mr. Papst received additional productions of documents, dated October 15, 2018, and December 14, 2018, which the parties stipulated were provided by Defendant. *See* Plaintiff's Exhibits 7-8. Within Plaintiff's Exhibit 7, there were over one hundred pages redacted in their totality. For example, C231-C337, E14, E33-36, G18-55, G70-87, G149, G154-204, and many more pages were completely redacted. Mr. Papst testified that he was not given an explanation for those

redactions, nor did Defendant indicate that any investigations were ongoing or open that would subject them to exemption. *See* Plaintiff's Exhibit 7. Mr. Papst received an additional disclosure, totaling approximately 10,000 pages, pertaining to similar investigations discussed in Defendant's prior disclosures. *See* Plaintiff's Exhibit 8. However, Defendant never produced any emails, or hard copies of emails, pertaining to grade changing allegations from any school.

On cross-examination, Defendant introduced email communications between counsels to illustrate that Mr. Papst was not the party in direct communication with Defendant. *See* Defendant's Exhibit 1. Defendant then revisited the inquiry into what Mr. Papst intended when he requested documents "collected or created" by Baltimore City Public Schools. *See* Plaintiff's Exhibit 1. Mr. Papst proffered that he included examples of the materials that he sought, but that list was not intended to be exhaustive. Additionally, Mr. Papst contended that a "thorough" investigation could not be conducted into these allegations without emails. Defendant's questioning of Mr. Papst elicited testimony that Mr. Papst had not explicitly requested emails in his MPIA Requests. Defendant also cross-examined Mr. Papst on his reporting with "Project Baltimore" and whether he had reported on the documents provided thus far by Defendant. Mr. Papst responded that he had reported on television approximately twelve times and had utilized some of the documents produced by Defendant. *See* Plaintiff's Exhibit 7-8.

The Defendant then called its first witness to testify, Sally A. Robinson. Defendant established through testimony that Ms. Robinson is the Senior Counsel of School Services at the Office of Legal Counsel of Baltimore City Public Schools. She graduated from the California Western School of Law in 1993. Ms. Robinson worked at the Department from 1994-1995, and again from September 2000 to the present. As a result, Ms. Robinson is the longest employed attorney at the Department. Ms. Robinson testified that her duties include responding to MPIA

Requests, supervising one attorney that also handles MPIA Requests, and occasionally answers questions of MPIA interpretations for other attorneys. Ms. Robinson testified that she is familiar with the MPIA, its applicable case law, federal statutes such as The Family Educational Rights and Privacy Act of 1974 (hereinafter “FERPA”), as well as the Maryland Courts and Judicial Proceedings §3-8A-27. She indicated her understanding of Maryland Courts and Judicial Proceedings §3-8A-27 requires that police reports involving minors as suspects must be held separate and apart from other reports and cannot be disclosed without good cause shown and a court order. Ms. Robinson testified that she takes into account her aforementioned knowledge and nineteen years of experience in determining how she responds to MPIA Requests. Further, Ms. Robinson has handled hundreds of MPIA Requests in her capacity as an attorney for the Department.

During direct examination, Ms. Robinson articulated the steps she took in response to Plaintiff’s initial MPIA Request. Ms. Robinson indicated that she contacted the custodian of records, the Office of Staff Investigations, and requested that the documents be provided to her directly. Ms. Robinson described that the Office of Staff Investigations’ duties involve conducting investigations of wrongdoing and misconduct of employees, and even vendors and non-employees. The Office is comprised of four people, including one manager and three investigators. Ms. Robinson stated that it was not necessary for her to reach out to a different office or custodian because, from her experiences, she knew the Office of Staff Investigations to be the appropriate office to possess the records requested. After receiving the material from the Office of Staff Investigations, Ms. Robinson testified that she could not remember if she conducted additional research, but did issue an initial denial letter to Plaintiff. *See Plaintiff’s Exhibit 2.* During her testimony, Mr. Robinson again articulated the grounds for exclusion of the

records, as detailed in the denial letter and confirmed that she did not produce any documents at that juncture. Further, Ms. Robinson indicated that she did not feel redaction was appropriate due to the exemptions that she had provided. As far as the second MPIA Request, Ms. Robinson reaffirmed the same grounds for denial, but also proposed that such a request could not be fulfilled because even with redaction the individuals would be identifiable.

After dispatching the second denial letter, Ms. Robinson testified that she learned that Plaintiff had filed a lawsuit and Ms. Robinson remained involved in the collection of documents throughout the course of the lawsuit. Ms. Robinson indicated that she prepared documents to be delivered to Plaintiff, as well as an Affidavit and Vaughn Index in an attempt to resolve the case. *See Defendant's Exhibit 2.* Additionally, and as a result of a hearing and ruling before the Honorable Barry Williams, Ms. Robinson produced a more detailed Vaughn Index. Ms. Robinson also produced a third Vaughn Index, aiming to address concerns Plaintiff had raised regarding documents redacted in their entirety. *See Defendant's Exhibit 4.* While Ms. Robinson testified that she produced documents in an attempt to resolve the matter, she also testified that she failed to produce emails because that would have been, in her opinion, outside the scope of Plaintiff's request. Ms. Robinson testified regarding a separate request made by Plaintiff that specifically identified the need for emails, which yielded 117,000 emails in response to three search terms: (1) grade change; (2) grade changing; and (3) change of grade. Again, Ms. Robinson affirmed that emails were, in her opinion, outside the scope of Plaintiff's MPIA Requests because Plaintiff solely sought investigative records.

On cross examination, Plaintiff questioned Ms. Robinson regarding her interpretation of the MPIA Requests. Ms. Robinson consistently testified that she interpreted emails to be outside the scope of the Requests. However, Ms. Robinson did concede that while she provided zero

documents in response to the Requests initially, since litigation ensued on December 20, 2017, she has provided sporadic productions of documents with redactions to Plaintiff. For example, on February 23, 2018, Ms. Robinson provided 73 pages of redacted documents. *See* Plaintiff's Exhibit 5. While Ms. Robinson acknowledged that documents have since been produced, she maintained that her understanding of FERPA required the withholding of documents that contained students' identifying information. In response, Plaintiff's counsel questioned whether the text of FERPA prohibits disclosure of documents or just prohibits federal funding to schools where identifying information is revealed. Ms. Robinson responded that was not her understanding.

Ms. Robinson again testified regarding the scope of the search conducted in response to Plaintiff's MPIA Requests and whether she took additional action to ensure documents were not lost or destroyed. Ms. Robinson indicated that she had not placed a litigation hold within the Department to prevent the destruction of documents and did not send a memorandum or email to the Department regarding the impending Requests, nor did she inquire with any schools whether there were hard copies of relevant documents. Ms. Robinson recognized that she relied on the collection conducted by the Office of Staff Investigations and was limited by the materials the Office produced. Additionally, Ms. Robinson acknowledged that the standards for collecting documents under the MPIA are different from the standards implemented in the Office of Staff Investigations for collecting documents. Further, Ms. Robinson testified regarding Plaintiff's oral request, dated March 1, 2018, in an attempt to receive emails relating to grade changing investigations. While Defendant maintains that this request is excluded from this matter, Ms. Robinson testified to her capabilities to conduct an email search based upon search terms. While Defendant never produced any emails pursuant to Plaintiff's MPIA Requests, Ms. Robinson

acknowledged that emails are subject to automatic deletion after three years. Emails were produced during the course of Ms. Robinson's testimony as a result of three key search terms (grade change; grade changing; change of grades). *See* Defendant's Exhibit 3; Plaintiff's Exhibit 9. Given the automatic deletion policy, emails prior to September 2014 would have been deleted because there was no litigation hold implemented, nor was an initial email search conducted in response to the initial September 5th Request.

During testimony, Ms. Robinson reiterated that everything requested within the possession of the Office of Staff Investigations has been produced, subject to redactions by appropriate exemptions. First, Ms. Robinson addressed the intra-agency exemption which covers materials produced by employees that are pre-decisional, and are therefore covered by the deliberative process privilege. Plaintiff attempted to elicit testimony stating that underlying "facts" are not covered by the deliberative process privilege, but Ms. Robinson explained that it depends on how intertwined the facts are to recommendations on policy. Ms. Robinson's understanding was that materials pursuant to an investigation are pre-decisional and covered by the privilege. Ms. Robinson explained the process when an allegation is received and investigated as follows: (1) an allegation is received; (2) Chief Legal Counsel directs the Office of Staff Investigations to investigate; and (3) if the allegation is "sustained" then there is possible discipline imposed by the Office of Human Capital.

On re-direct examination, Ms. Robinson addressed the public interest in safeguarding education and identifying individuals engaged in grade changing. Further, Ms. Robinson testified that there is an interest in allowing individuals to investigate these allegations with the assistance of witnesses who feel comfortable to come forward, as well as prohibiting perpetrators to cover up their actions and impede the investigation. Ms. Robinson explained while there is no

prohibition on disclosing the materials produced thus far, there was also no prohibition from withholding the materials, as that determination was discretionary. Ms. Robinson testified that her obligations were to request the records from the Office of Staff Investigations, review those records, and make her determinations. On re-cross examination, Ms. Robinson conceded that between the time of her initial denials of all records, to the time of production of nearly 11,000 pages of records and 3 Vaughn Indexes, the only thing that had changed was that BCBSC was sued. There were no additional proceedings initiated, no other lawsuits filed, and no further appeals that would prevent disclosure of investigations B-J, stemming from 2012-2017. Furthermore, Investigation A was not completed at the time of the initial Request, but has since concluded in 2018.

Following the conclusion of Ms. Robinson's testimony, Plaintiff moved for Judgment under numerous grounds: (1) the search was unreasonable; (2) the exemptions relied on by Defendant did not apply; and (3) Defendant has failed to show it is in the public interest to withhold the records. In response, Defendant moved for Judgment as well under the following grounds: (1) Plaintiff has failed to establish that it was entitled to records beyond investigatory records; and (2) the cited exemption apply for withholding the requested records. This Court denied both Plaintiff's and Defendant's Motions for Judgment.

Next, Plaintiff called Shashi Buddula, the Chief Information Technology Officer Interim at Baltimore City Public Schools. Mr. Buddula established that he had been with Baltimore City Public Schools since 2010, and had worked within the IT field for 20 years. Mr. Buddula testified that he is responsible for a portion of the document retention policy, but he was unaware of any litigation holds in place related to this case. Mr. Buddula confirmed that Defendant utilizes Microsoft 365, which includes a suite of products, and the email system is capable of

identifying key word searches. Mr. Buddula testified that there are different retention policies for different types of documents, and he is unaware of how to suspend auto-deletion. On cross-examination, Defendant established from Mr. Buddula that there are 60 employees in the IT department that are delegated different responsibilities.

Following Mr. Buddula's testimony, Plaintiff's counsel, Scott Marder, testified regarding attorney's fees. Mr. Marder testified that he was retained in December 2017 in order to file a Complaint on behalf of Plaintiff. Mr. Marder explained that he attended the University of Miami Law School *magna cum laude*, and has extensive trial experience and experience related to public records. He also explained he is well versed in civil litigation, has had over 100 jury trials, and has argued hundreds of motions. Mr. Marder indicated that his rates are as follows: (1) in 2017, \$525/hour; (2) in 2018, \$525/hour, and (3) in 2019, \$540/hour. Mr. Marder testified that the total invoices amounted to \$122,720.70, but did not include additional fees from trial. *See* Plaintiff's Exhibit 12. Mr. Marder testified that this case required a tremendous amount of time to prepare and present, and that his rates are reasonable in comparison to rates of attorneys in the area with similar experience. Further, Mr. Marder indicated the rates of his associates and paralegals, citing that his paralegal's rate was \$150-160/hour and his associate's rate was \$300/hour, both of which he indicated were considered low in the present market. Mr. Marder proffered that his work was reasonable, necessary, and caused by the "scorched Earth/fight everything" aggressive litigation tactics utilized by Defendant. *See* Plaintiff's Exhibit 13. On cross-examination, Defendant established that Mr. Marder did not request an immediate hearing in the Complaint, despite the language articulated in §4-362(c). However, Mr. Marder testified that he did not oppose Defendant's Request for Immediate Hearing. *See* Defendant's Exhibits 8-9.

At the conclusion of testimony, both parties delivered closing arguments. Plaintiff argued that, pursuant to the two MPIA Requests, Defendant was required to conduct a global search, not solely isolated to the Office of Staff Investigations which was unresponsive. Plaintiff contended that the numerous exemptions provided by Defendant, namely the attorney work product doctrine, the investigations exemption, FERPA, the students records exemption, and the deliberative process privilege were not applicable in this case and Defendant did not meet the burden of the exemptions. Further, Plaintiff argued that documents that were completely blacked out should have been appropriately redacted to prevent the reveal of personally identifying information. In sum, Plaintiff demanded seven requests of this Court: (1) order Defendant to conduct a search for all documents responsive to the MPIA Requests beyond that Office of Staff Investigations, in hard copy and email; (2) find that Investigation A is closed, and that Defendant shall produce documents from Investigation A; (3) remove redactions from investigation reports; (4) take pages that are completely blacked out and only redact personally identifying information; (5) find that Defendant acted knowingly and willingly, and find statutory damages of \$1,000 under §4-362(d); (6) find that Defendant acted arbitrarily and capriciously, and take disciplinary action under §4-362(e); and (7) attorney's fees under §4-362(f).

During closing arguments, Defendant maintained that Ms. Robinson correctly interpreted the plain language of the MPIA Requests. Defendant argued that Ms. Robinson, based upon her interpretations, used her discretion to withhold the records at issue. There are two prongs to the court's analysis: first, the Court must determine the scope of the request, and Defendant proffered the scope was solely for investigative records, not emails; and second, the Court must determine whether Defendant improperly denied the requested records. Closing arguments concluded with an affirmation that there was no bad faith evident in this case, and that Defendant

attempted to produce records to reconcile with Plaintiff and avoid litigation. The court trial terminated at 7:30 pm after nine to ten hours of testimony and argument.

II. Standard of Review

Judicial review of an agency decision addressing the MPIA is governed by Maryland General Provision Code §4-362(a), which permits a person who was denied access to inspection under the act to file a complaint in the circuit court. Pursuant to Maryland General Provision Code §4-362(b), the Defendant has the burden of sustaining a decision to deny inspection of a public record, or a copy of such record. For the purposes of the MPIA, a public record is an “original, or any copy of, a documentary material that is made by a unit of or an instrumentality of the State or a political subdivision, or received by the unit or instrumentality in connection with the transaction of public business.” Md. Code Gen. Prov. §4-101(j)(1)(i). Notably, Defendant conceded in its Answer (#22) that the records requested by Plaintiff are public records. The MPIA establishes that all individuals are entitled to have access to information about the affairs of the government, and the official acts of public officials and employees. Md. Code Gen. Prov. §4-103 (noting that unless an “unwarranted invasion of the privacy...would result...this title shall be construed in favor of allowing inspection of a public record”).

Generally, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time, with reasonable regulations on which types of records may be available immediately upon request. Md. Code Gen. Prov. §4-201. After a request is made, a custodian shall deny inspection of a public record if: “(1) by law, the public record is privileged or confidential; or (2) the inspection would be contrary to: (i) a State statute; (ii) a federal statute or a regulation that is issued under the statute and has the force of law; (iii) the rules adopted by the Court of Appeals; or (iv) an order of a court of record.” Md. Code Gen. Prov. §4-301. The

custodian of records is burdened with making a “careful and thoughtful examination of each document which fairly falls within the scope of [a] request in order for the custodian to initially determine whether the document or any severable portion of the document meets all of the elements of an exemption.” *Cranford v. Montgomery Co.*, 300 Md. 759, 777 (1984). If the government intends to withhold portions of a public record, it must provide particularized justification for each portion that its claims is exempt from disclosure. *Prince George’s Cty. v. The Washington Post Co.*, 149 Md. App. 289, 310 (2003). It was not the intent of the General Assembly to allow for “custodians broadly to claim exceptions and thereby routinely to pass to the courts the task of performing *in camera* inspections.” *Cranford*, 300 Md. at 777.

The standard in determining whether an *in camera* inspection is to be made is whether the trial court determines it is needed in order to make a “responsible determination on claims of exemptions.” *Cranford*, 300 Md. at 779. There are numerous factors in consideration of conducting an *in camera* inspection, including “judicial economy, the conclusory nature of the agency affidavits, bad faith on the part of the agency, disputes concerning the contents of the document, whether the agency has proposed *in camera* inspection, and the strength of the public interest in disclosure.” *Id.* The *Cranford* court notes that when withheld documents are voluminous it is understandable for a trial court to be reluctant to conduct an *in camera* inspection, and judicial economy would support directing the agency to provide additional supporting materials. *Id.*

In this instance, the Court considered the conclusory nature of Defendant’s affidavits and assertions from Defendant that all relevant materials pursuant to Plaintiff’s MPIA Requests had been produced. Further, the Court considered the potential motives on the part of the agency who failed to provide any responsive documents to Plaintiff prior to the initiation of a lawsuit on

December 20, 2017. Once legal action was initiated, the parties continued to dispute the scope of the MPIA Requests, the contents of the records responsive to the Requests, as well as the actions taken by Defendant in collecting records responsive to the Requests. The Court reviewed the fragmented document productions, as well as the reasons that prompted additional productions by the Defendant that resulted in zero documents to nearly 11,000 documents. Depending on the Court's findings, and pursuant to Maryland General Provision Code §4-362(c)(3), this Court has the authority to enjoin the holder of the public record from withholding the record, or a copy, and issue an order compelling the production of the public record that was withheld, or a copy.

III. Law

1. Maryland Public Information Act Exceptions

a. Inspection of Student Records §4-313

With limited exceptions, a custodian shall deny inspection of a school record regarding the home address, home telephone number, biography, family, physiology, religion, academic achievement, or physical or mental ability of a student. Md. Code Gen. Prov. §4-313(a). There are instances which require access to inspection when there is a "person in interest" or "an elected or appointed official who supervises the student." *Id.* at §4-313(b). A "person in interest" includes a person or governmental unit that is the subject of a public record or the parents or legal representatives of a person with a legal disability. Md. Code Gen. Prov. §4-101(g). Pursuant to the MPIA Manual, the student records exemption applies, even after redaction, "if a person could readily match students with the disclosed files." MPIA Manual at 3-14. Conversely, if, following redactions, a person could not readily match students with the disclosed files, then the student records exemption would not apply.

b. Family Education Rights and Privacy Act (“FERPA”)

In regards to the Family Education Rights and Privacy Act (“FERPA”), the Act denies funds to “any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information...)” 20 U.S.C. §1232g(6)(b)(1). Maryland courts have recognized the purpose of FERPA as follows:

FERPA was adopted to address systematic, not individual, violations of students’ privacy and confidentiality rights through unauthorized releases of sensitive educational record. The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release student records.

Zaal v. State, 36 Md. 54, 71 (1992) (citing *Smith v. Duquesne University*, 612 F. Supp. 72, 80 (W.D. Pa. 1985)).

Once records are properly redacted to prevent the disclosure of personally identifying information, FERPA does not prevent the release of such records. *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (stating “[N]othing in FERPA would prevent the Universities from releasing properly redacted records”).

c. Inspection of Personnel Records §4-311

With limited exceptions, a custodian shall deny inspection of personnel records of an individual, including an application, a performance rating, or scholastic achievement information. Md. Code Gen. Prov. §4-311(a). The limited exceptions include inspection by the person in interest; an elected or appointed official who supervises the work of the individual; or an employee organization. *Id.* at §4-313(b). While the aforementioned list of records was “probably not intended to be exhaustive, it does reflect a legislative intent that ‘personnel records’ mean those documents that directly pertain to employment and an employee’s ability to perform a job.” *Kirwan v. The Diamondback*, 352 Md. 74, 83 (1988). Namely, personnel records

include records “relating to hiring, discipline, promotion, dismissal, or any matter involving an employee’s status.” *Montgomery Cty. v. Shropshire*, 420 Md. 362, 378 (2011) (referencing prior decision in *Kirwan*). The purpose of the personnel records exemption is to prevent the reveal of personal information, but once “all identifying information” is redacted, personnel records lose their protected status. *NAACP Branches*, 430 Md. at 195 (following redaction the records lost exemption status).

d. Inspection of Investigatory Records §4-351

A custodian of records may deny inspection of records of: “(1) investigations conducted by the Attorney General, a State’s Attorney, a municipal or county attorney, a police department, or a sheriff; (2) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or (3) records that contain intelligence information or security procedures of the Attorney General, State’s Attorney, a municipal or county attorney, a police department, a State or local correctional facility, or sheriff.” Md. Code Gen. Prov. §4-351(a). The custodian, however, can only deny inspection to the extent that the inspection would: (1) interfere with a valid and proper law enforcement proceeding; (2) deprive another person of a right to a fair trial or impartial adjudication; (3) constitute an unwarranted invasion of personal privacy; (4) disclose the identity of a confidential source; (5) disclose an investigative technique or procedure; (6) prejudice an investigation; or (7) endanger the life or physical safety of an individual.” *Id.* at §4-351(b). Utilizing this exemption requires more than just an assertion that the records are relevant to law enforcement purposes, but rather the custodian must show that disclosure would “result in prejudice to the particular investigation.” *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 87 (1988). An agency “may only refuse to disclose...when disclosure would interfere with an ongoing investigation or jeopardize future

proceedings.” *Bowen v. Davison*, 135 Md. App. 152, 161 (2000). Additionally, the denying agency must demonstrate that the “harm from disclosure of the public record is greater than the public interest in access to the information in the public record.” Md. Code Gen. Prov. §4-301(b)(2).

e. Interagency or Intra-Agency Letters or Memoranda §4-344

Pursuant to Maryland Code General Provision §4-344, “a custodian of records may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.” In order for records to be deemed intra-agency letters or memoranda, the records “must have been created by government agencies or agents, or by outside consultants called upon by a government agency ‘to assist in the internal decision making.’” *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 552 (2000) (citing *County of Madison v. United States Dep’t of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981)). The focus proscribed in this exemption is to protect the decision-making process. Accordingly, courts have recognized the exemption to apply to “pre-decisional communications, not those made after the decision is made.” *Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151, 165 (2004) (referencing federal courts’ adaptation of the equivalent exemption). In addition to the distinction between pre-decisional and post-decisional records, Maryland courts have recognized the distinction between deliberative opinions compared to “purely factual data.” *Stromberg*, 382 Md. at 166 (noting that the distinction is not always clear). Maryland courts, recognizing Supreme Court precedent, have held that “...factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation...” *Id.* (citing *EPA v. Mink*, 410 U.S. 73, 87-88 (1973)). Given that Maryland Code General Provision §4-344 allows for denial of records that would *not*

be available by law in litigation, records that would be discoverable are therefore not exempt. Again, given that Maryland Code General Provision §4-344 allows for permissive denials, the denying agency must demonstrate that the harm from disclosures is greater than the public interest in access to the information within the record. Md. Code Gen. Prov. §4-301(b)(2).

f. Attorney Work Product

Pursuant to the Maryland Rules governing discovery, a party may obtain discovery of documents, electronically stored information, and tangible things prepared in anticipation of litigation if they are relevant to the subject matter, and are not protected by privilege. Md. Rule 2-402. However, once a party makes the required showing that the material is discoverable, the “court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Md. Rule 2-402(d). A party may obtain discovery of such documents upon a showing that the requesting party has a “substantial need for the materials in preparation of the case...” Md. Rule 2-402(d). Additionally, any agency claiming a work product denial for inspection must “identify the litigation for which the document was created (either by name or through factual description) and explain the reasons the work product privilege applies to the specific document portions.” *Prince George’s Cty. v Washington Post Co.*, 149 Md. App. 289, 335 (2003)(internal citations omitted).

g. Damages §4-362(d)

Pursuant to Maryland Code General Provision §4-362(d), “a defendant government unit is liable to the complainant for statutory damages and actual damages that the court considers appropriate if the court finds that any defendant knowingly and willingly failed to: (i) disclose or fully disclose a public record that complainant was entitled to inspect under this title; or (ii)

provide a copy...” The statutory damages imposed by the court may not exceed \$1,000. *Id.* at §4-362(d)(3).

h. Disciplinary Action §4-362(e)

Pursuant to Maryland Code General Provision §4-362(e)(1), “whenever the court orders the production of a public record or copy...was withheld from the applicant, and, in addition, finds that the custodian acted arbitrarily or capriciously in withholding the public record or the copy... the court shall send a certified copy of its finding to the appointing authority of the custodian.” Upon receipt of the statement of the court and after investigation, “the appointing authority shall take the disciplinary action that the circumstances warrant.” *Id.* at §4-362(e)(2).

i. Legal Fees §4-362(f)

Pursuant to Maryland General Provision Code §4-362(f), “if the court determines that the complainant has substantially prevailed, the court may assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred.” The decision on whether to award counsel fees lies within the discretion of the trial judge. *Kline v. Fuller*, 64 Md. App. 375, 388 (1985). In order to determine whether a party has substantially prevailed, there are numerous factors a trial court should consider including, but not limited to: (1) “the benefit to the public, if any derived from the suit; (2) the nature of the complainant’s interest in the released information; and (3) whether the agency’s withholding of the information had a reasonable basis in law.” *Kirwan*, 352 Md. at 96 (citing *Kline*, 64 Md. App. at 386).

IV. Reasoning

a. The MPIA Requests

On September 5, 2017, Plaintiff, by way of Fox 45 reporter Chris Papst, initiated the first MPIA Request through an email to Defendant. The initial MPIA Request states, in relevant part:

“Under the Maryland Public Information Act, Fox 45 in Baltimore, MD is requesting any and all documentation collected or created by Baltimore City Public Schools concerning grade changing reports/allegations/investigations made since 2010. In this request, we are seeking—for example—the initial claim, response to that claim, paperwork/documents gathered via the investigation, and any result or follow up information related to that claim. Please include any pending claims/claims not yet resolved.”

Plaintiff’s September 5th Request requires a segmented analysis. First, the Request seeks “any and all documentation.” Plaintiff’s sole qualifying limitation on the documents requested is that the documents were “made since 2010.” Plaintiff did not place any boundaries on its Request to include any particular category of documents, nor did Plaintiff identify specific senders or receivers of the documents sought. Contrary to the broad request, Ms. Robinson testified that she interpreted the request to be limited in scope to investigatory records within the Office of Staff Investigations.

Next, the Request sought documentation “collected or created by Baltimore City Public Schools.” Plaintiff sought records in the possession of the entire Department, and did not limit its request to a particular office, school, or investigatory file. During trial, Mr. Papst testified that his request intended to include emails pertaining to grade changing allegations. However, Ms. Robinson testified that she interpreted the Request to solely involve investigation files possessed by the custodian of the Office of Staff Investigations.

Plaintiff’s September 5th Request then sought documentation “concerning grade changing reports/allegations/investigations made since 2010.” Mr. Papst testified that “concerning” was intended to account for all documents related to reports, allegations, and investigations. While the parties disagreed on the plain meaning of the word, “concerning,” according to Merriam-Webster, the definition of “concerning” is “relating to.”⁴

⁴ MERRIAM-WEBSTER, Definition “Concerning”, available at https://www.merriam-webster.com/dictionary/concerning?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

In response, Defendant contended that it relied solely on the plain language of Plaintiff's request, which did not include a detailed account of the types of documents Plaintiff sought, and therefore it appears Defendant conducted a more conservative search for records that solely included investigatory files.

Finally, there was a dispute among the parties at trial regarding whether "for example" was limiting language, or whether it was inclusive language. Plaintiff proffered that "for example" was intended to mean inclusivity of the documents listed, but not limited to the documents listed. Defendant contends that it relied on the plain language of the Request, and its search for documents was therefore in accordance with the language it found to be limiting.

On November 10, 2017, Plaintiff delivered a second MPIA Request through an email to Defendant. The November 10th Request states, in relevant part:

"Under the Maryland Public Information Act, Fox 45 in Baltimore, MD, is requesting any and all documentation collected or created by Baltimore City Public Schools concerning the 2017 investigation into allegations of grade changing at Northwood Appold Community Academy II, or NACA II. In this request, we are seeking the complete report in its entirety. We understand, and appreciate, the report may need redacted to exclude names of teachers, investigators, administrators, students or any other personnel involved in the internal investigation."

Pursuant to the November 11th Request, Plaintiff had limited the scope of its Request to an investigation into grade changing at one particular school, NACA II. While Plaintiff acknowledges it constricted the scope of Defendant's search within the second Request, Plaintiff maintains that the records that would have been responsive to the November 11th Request should have been encompassed in the September 5th Request. In an attempt to address one particular investigation, Plaintiff sought Defendant's complete report, in its entirety, of the investigation into grade changing at NACA II. During trial, Ms. Robinson testified that Defendant was not in a position to provide records pertaining to a particular school because such production would

preclude Defendant's ability to preserve personally identifying information. Given that Plaintiff's November 11th Request demands records subsequent to 2010, the Court finds that records responsive to the Request would have been encompassed within the September 5th Request. Accordingly, no further analysis is required of the plain language of the November 11th Request.

Based on the parties' segmented analysis, this Court relies on the Merriam-Webster Dictionary definition of "concerning," which means "relating to." Therefore, the logical conclusion is that Plaintiff broadly sought all documentation relating to grade changing. The Court, too, understands "for example" to be inclusive language, and therefore interprets Plaintiff's Requests to stretch beyond the scope of enumerated documents provided by Defendant. In the modern business world, internal emails are the quickest and most effective means of communicating and disseminating information. The broad language of Plaintiff's Request required a much broader search than the one contemplated by Defendant. While responding to the totality of Plaintiff's Request may have led to copious amounts of records, the language in Plaintiff's Request required such an inquiry including emails. Therefore, this Court finds Defendant's narrow and limiting interpretation of Plaintiff's MPIA Requests unreasonable.

b. Scope of the Search

Initially, Defendant denied Plaintiff's two MPIA Requests, in their totality, and failed to produce any documents in response to the Requests. However, after Plaintiff hired counsel on December 20, 2017, and initiated litigation, Defendant began to produce a series of documents in response to Plaintiff's September 5th MPIA Request. Notably, and as articulated above, Defendant maintained at trial that it cannot provide records in response to the November 11th Request because production would undoubtedly reveal identifying information such as the

parties subject to the investigation. The following is a brief recitation of the productions of documents provided by Defendant. On February 23, 2018, Defendant produced 73 pages of redacted documents. On March 1, 2018, Defendant produced 2 pages of the same documents produced prior, but with fewer redactions. On July 3, 2018, Defendant produced its first Vaughn Index, totaling 21 pages. On October 15, 2018, Defendant produced its second Vaughn Index, totaling 143 pages. On October 15, 2018, Defendant produced 1,021 pages of redacted documents. On December 14, 2018, Defendant produced its third Vaughn Index, totaling 49 pages. On December 14, 2018, Defendant produced 9,977 pages of redacted documents.

Through its pleadings, testimony, and arguments presented at trial, Defendant made evident that Ms. Robinson was responsible for providing responses to MPIA Requests received by the Department. On direct examination, Ms. Robinson testified that upon receiving the MPIA Requests from Plaintiff, she contacted the Office of Staff Investigations to collect relevant records. Ms. Robinson testified that pursuant to her experience within the Department, she knew the Office of Staff Investigations to be the appropriate custodian of record. Ms. Robinson conceded that standards for MPIA Requests are more stringent than general requests submitted to the Office of Staff Investigations. That Office is comprised of one manager and three investigators, none of whom were noted as attorneys. Pursuant to admissions made throughout testimony, Ms. Robinson failed to contemplate that records that would be responsive to Plaintiff's Requests could be held by other custodians within the Department. Ms. Robinson neglected to contact other personnel within the Department to inquire whether they possessed any records that would be responsive to Plaintiff's MPIA Requests. Also, Ms. Robinson neglected to send out an email or memoranda to the Department's staff indicating that such

Requests were received, nor did she place a litigation hold on any Department documents or emails.

Further, Ms. Robinson narrowly interpreted Plaintiff's MPIA Requests to exclusively mean "investigative records," rather than, for example, emails sent and received within the Department. Failing to search and collect emails relevant to Plaintiff's MPIA Requests is perhaps the most glaring shortcoming in Defendant's search for relevant documents. Given this error, emails subject to a three year deletion policy could have been deleted from the time of the MPIA Requests to the date in which Defendant initiated three key word searches through email (grade change, grade changing, change of grades) pursuant to the March 1, 2018 oral MPIA Request. Both Ms. Robinson and Mr. Buddula testified to the key search term capabilities of Defendant's email program, Microsoft 365, further illustrating that Defendant had both the capability and opportunity to conduct a thorough email search had Ms. Robinson interpreted the MPIA Requests to be more inclusive. Rather, due to the narrow interpretation of Plaintiff's Requests, Plaintiff was limited to materials provided by the Office of Staff Investigations, in which documents were partially or completely redacted by Ms. Robinson prior to disclosure. Accordingly, this Court finds that Defendant did not conduct a reasonable search in response to Plaintiff's MPIA Requests.

c. Exemptions Asserted by Defendant

i. Student Records §4-313

A custodian shall deny inspection of a school record regarding the home address, home telephone number, biography, family, physiology, religion, academic achievement, or physical or mental ability of a student. Md. Code Gen. Prov. §4-313(a). However, a person in interest or an elected or appointed official who supervises the student can demand inspection of student

records. *Id.* at §4-313(b). Plaintiff, a news media source, does not contend that it is a person in interest pursuant to Maryland Code General Provision §4-101(g), but rather contends that relevant student records could have been redacted to prevent the reveal of the aforementioned identifying information. Relying on *Maryland Department of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179, 195 (2012), Plaintiff argues that it is entitled to portions of a student record once redactions are made to prevent a violation of the student records exemption. While the court in *NAACP Branches* analyzed records concerning Maryland State Troopers, the analysis is nonetheless analogous. In *NAACP Branches*, once the names of the Troopers, the names of the complainants, and all identifying information was redacted from the records, the records had lost exemption status. *Id.* at 195.

In this case, Plaintiff has maintained that the MPIA Requests are not an attempt to collect personally identifying information about students. Rather, Plaintiff argues that had appropriate redactions been done, the student records would no longer be subject to the exemption. The Court acknowledges that Plaintiff is not a person in interest for the purposes of §4-101(g), and is therefore not entitled to the student records absent redactions. However, Plaintiff is entitled to portions of the student records once the records are sufficiently redacted, so as to render the records no longer subject to status as individuals' records.

While redactions to students' home addresses, telephone numbers, biographies, family histories, physiologies, and religion may cure the reveal of personally identifying information, there is a secondary inquiry into whether these records pertain to "academic achievement" or "physical or mental ability" of a student. The purpose of Plaintiff's MPIA Requests was to uncover materials pertaining to grade changing allegations in Baltimore City Public Schools. Plaintiff has declined to seek qualitative reports of academic achievement from any particular

student, nor has Plaintiff sought quantitative evaluations of students performed by teachers. Accordingly, the records sought are not precluded under the Students Records exception, but should be redacted to prevent the dissemination of students' personal identifying information as noted in §4-313(a).

ii. FERPA 20 U.S.C. §1232g

Aside from the student records exemption, Defendant contends that FERPA also prohibits the disclosure of student records. Courts in Maryland have recognized the objective of FERPA is to prevent institutions from carelessly divulging students' records. *Zaal v. State*, 36 Md. at 71. While Defendant is correct insofar that FERPA addresses systemic problems of the privacy of students within educational institutions, Defendant's proffer that FERPA precludes production of student records in their totality is misleading. Given that FERPA is a federal statute, federal courts have weighed in on FERPA's applicability concerning the production of student records. As stated in *United States v. Miami University*, 294 F.3d 797, 824 (6th Cir.), FERPA does not prevent institutions from releasing properly redacted records. Accordingly, the Court finds that FERPA does not preclude production of student records in their totality, and as stated above, students records are subject to production pending the redaction of personally identifying information.

iii. Personnel Records §4-311

The Maryland Code General Provision §4-311(a) does not allow publication of an individual's personnel records. The underlying intent of the personnel records exemption is to protect records directly pertaining to employment such as records "relating to hiring, discipline, promotion, dismissal, or other matters regarding an employee's status." *Shropshire*, 420 Md. at 378. Parallel to the student records exemption, the personnel records exemption aims to prevent

the reveal of personally identifying information. Once “all identifying information” is redacted, personnel records lose exemption status. *NAACP Branches*, 430 Md. at 195.

In this instance, Plaintiff does not request records for employees’ applications, performance ratings, or scholastic achievements. *Contra* Md. Code Gen. Prov. §4-311(a). Plaintiff’s Requests may be reconciled within the §4-311 exemption. While allegations regarding grade changing occurred within the scope of teachers, administrators, or principals’ employment, the personnel records exemption aims to protect personally identifying information regarding an employee’s status throughout his or her employment. As long as records do not contain personally identifying information, they are subject to production under *NAACP Branches*. Accordingly, the records sought by Plaintiff are not precluded from production for inspection by the personnel records exception, but should, again, be subject to redaction to prevent the sharing of confidential information.

iv. Investigatory Records §4-351

Under Maryland Code General Provision §4-351, a custodian of records may deny inspection of records of: “(1) investigations conducted by the Attorney General, a State’s Attorney, a municipal or county attorney, a police department, or a sheriff; (2) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or (3) records that contain intelligence information or security procedures of the Attorney General, State’s Attorney, a municipal or county attorney, a police department, a State or local correctional facility, or sheriff.” Md. Code Gen. Prov. §4-351(a) (subject to additional considerations under §4-351(b)).

In this instance, Defendant alleges that the inspection of such records would both trigger an unwarranted invasion of personal privacy, as well as disclose investigative techniques and

procedures that would prejudice its investigation into grade changing allegations. Given that teachers and school employees are perpetually under the microscope for performance and evaluation, Defendant argues that providing these records may lead to the potential for destruction of evidence in present investigations and presents the opportunity for teachers to be tipped in how Defendant investigates allegations of misconduct. Further, Defendant claims it must be in the position to substantiate bases or grounds for termination of teachers or employees, and revealing existing records pertaining to grade changing investigations could impede Defendant's ability to provide such bases. Accordingly, Defendant argues that producing records involving the investigations into grade changing would be against the public interest.

In response, Plaintiff's argument for disclosure is two-fold. First, Plaintiff argues that the records fail to meet the definition of investigatory records because Defendant is not an enumerated law enforcement agency. Additionally, Ms. Robinson testified that there was no pending litigation, and all cases had been closed. Therefore, Defendant has failed to demonstrate that production of the records would "interfere with an ongoing investigation or jeopardize future proceedings." *Bowen*, 135 Md. App. at 161. Second, Plaintiff contends that Defendant has failed to demonstrate why disclosure would be contrary to the public interest. Md. Code Gen. Prov. §4-301(b)(2).

In this case, Defendant conceded that Investigations B-J are considered closed investigations. Notably, Defendant argued that Investigation A was initially precluded in its totality because it was considered an open investigation. Pursuant to testimony at trial, Investigation A is now closed and under the same umbrella of scrutiny as Investigations B-J. During Ms. Robinson's testimony, Plaintiff sought an explanation of the internal investigation process of grade changing allegations. Ms. Robinson indicated that the investigation portion is conducted by Department

employees, not a law enforcement agency, then their findings are given to Chief Legal Counsel, and if those findings are substantiated then they are forwarded to Human Capital. As far as investigation tactics, Ms. Robinson indicated that the Department interviewed individuals and used LexisNexis, but she was unsure if investigators used confidential sources.

While Investigations A-J are now closed, Ms. Robinson articulated that disclosure of the Department's investigative tactics would be detrimental to future investigations. As stated above, Ms. Robinson alleged that inspection of the withheld records would reveal the Department's investigative tactics, as well as insight fear in the Department's investigators that their work would be viewed under a microscope and be subject to scrutiny. While the Court acknowledges Ms. Robinson's concerns, Ms. Robinson fails to articulate with any specificity what investigations would be prejudiced due to the production of the public records, and has failed to identify any ongoing investigations that would be jeopardized.

Given that Plaintiff contends that the Court should not consider the records to fall within the investigatory records exemption, Plaintiff argues the Court does not arrive at the public interest question. While the Court acknowledges that Defendant is not an enumerated law enforcement agency, Plaintiff and Defendant propose conflicting public interests that are worthy of analysis. Defendant proffered, through testimony by Ms. Robinson, that there is public interest in ensuring that individuals can come forward with allegations without fear of reprisal, and ensuring that investigators can conduct their investigations without the fear of being scrutinized under a microscope. Plaintiff, on the other hand, repeatedly highlighted the importance of the status and conditions of education within Baltimore City Public Schools, specifically whether students are receiving the appropriate grades that they earned. The public has an interest that students receive a good education, and parents have an interest that their children gain the requisite knowledge

base to build and advance through higher education. The public is entitled to the real facts, not mere speculation, concerning public education, as well as the implementation of tax payers' money. In evaluating the parties competing arguments, the Court must decipher whether Defendant has demonstrated that the "harm from disclosure of the public record is greater than the public interest in access to the information." Md. Code Gen. Prov. 4-301(b)(2). The Court is not convinced that the potential for prejudice or interference with existing and future investigations outweighs the public interest in the public's access to information regarding the caliber of education provided by the Baltimore City Public Schools system. Accordingly, Defendant shall not deny Plaintiff inspection of the records on the basis of the investigatory records exemption.

v. Intra-Agency Letters or Memoranda §4-344

Maryland Code General Provision §4-344 permits a custodian of record to deny inspection of intra-agency records. Defendant contends that the public records were appropriately withheld under the Intra-Agency Letters or Memoranda exemption. Pursuant to *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 552 (2000), for the exemption to apply the records must have been created to "assist in the internal decision making." Accordingly, the exemption protects pre-decisional communications, rather than post-decisional communications. *Stromberg*, 382 Md. at 165. This exemption also encompasses the deliberative process privilege, in which Maryland courts have drawn a distinction between materials founded in opinion versus opinions founded in "factual data." *Id.* at 166. Given that factual data, even if found within deliberate memoranda, would be discoverable by a party in litigation, it too would be available for production notwithstanding the exemption. *Id.*; *see* Md. Code Gen. Prov. §4-344 (allowing for denial of records that would not be available by law in litigation). Given that the

intra-agency letters or memoranda exemption is permissive, Defendant is also tasked with demonstrating that the harm from disclosure is greater than the public interest in accessing the information. Md. Code Gen. Prov. §4-301(b)(2).

Defendant contends that the records contained intra-agency materials investigating the grade changing allegations, and therefore were pre-decisional and protected by the deliberative process privilege. For example, Plaintiff observed that the “recommendations” sections of reports were redacted in their totality. Ms. Robinson indicated that while this exemption allowed for discretionary denial, she understood the deliberative process privilege as a method to protect public employees’ opinions and recommendations without the threat of them being divulged, and to prevent employees from working in a fish bowl. Referring back to Plaintiff’s MPIA Requests, Plaintiff sought “any and all documentation collected or created by Baltimore City Public Schools concerning grade changing reports/allegations/investigations made since 2010...” Plaintiff’s Exhibit 1. Maryland courts have acknowledged that the exemption reflects a “policy of protecting the decision making processes of government agencies... and focus on documents’ reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Cranford*, 300 Md. at 773 (internal quotations omitted). In Plaintiff’s MPIA Requests, Plaintiff does not request materials founded upon opinion, but rather requests materials derived in fact that are utilized by the Department to substantiate or dismiss allegations of grade changing. However, at trial, Plaintiff also sought the removal of redactions from recommendations sections of documents previously produced by Defendant.

Given that the recommendations section remain redacted from records produced by Defendant, an additional analysis into public interest is obligatory. As noted in Maryland Code

General Provision §4-344, the intra-agency letters or memoranda exemption, and as testified to during trial, the exemption allows for a discretionary denial. In the case of a discretionary denial, the denying agency must also demonstrate that the harm from disclosure is greater than the public interest in access to the information. Md. Code Gen. Prov. §4-301(b)(2). Defendant contends that the recommendations sections are products of the deliberative process privilege, and therefore are exempt from production. Moreover, Defendant contends that there is public interest in protecting the process in which investigators utilize to mobilize complaints into investigations, and potentially into substantiated findings. While the Court acknowledges the interest in protecting the deliberative process, the Court does not find that the ability for investigators to operate without scrutiny outweighs the public's interest in making its own determination whether Defendant reacted appropriately. As previously discussed, there is a public interest in the quality of education in Baltimore City Public Schools. However, there is also value in allowing the public an opportunity to decipher independently whether the Department responded appropriately to allegations of grade changing. Plaintiff, a news media source with the vehicle to provide information to the public, should have access to the recommendations made by investigators in the Department. Accordingly, the Court finds that the Defendant cannot withhold documents based upon the discussed exemption, and orders the Defendant to provide the recommendations sections, absent redactions.

vi. Attorney Work Product

The attorney work product doctrine, codified in Maryland Rule 2-402(d), protects against the disclosure of “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Md. Rule 2-402 (applying to materials prepared in anticipation of litigation). During trial, Defendant conceded that there are not, and

were not, pending lawsuits relating to Investigations A-J, despite the records being critically redacted. All investigations had been rendered closed, and therefore Defendant fails to provide any viable reason for rendering the attorney work product doctrine applicable.

In this case, Plaintiff does not request Defendant's attorneys' mental impressions of allegations, nor does Plaintiff seek the attorneys' theories or strategies to address the allegations. Rather, Plaintiff sought public records pertaining to the substantive and factual nature of the allegations of grade changing, not the attorneys' opinions. The reporters of Project Baltimore, and the viewing public, are tasked with then developing their own mental impressions and opinions regarding both the allegations and the corresponding responses taken to address the allegations. Accordingly, given that Defendant has failed to articulate how Plaintiff's MPIA Requests rendered the attorney work product doctrine applicable, the Court finds that Defendant shall not rely on the doctrine to withhold public records.

d. Damages §4-362(d)

Under Maryland Code General Provision §4-362(d), the Court may impose statutory damages if the Court finds that the Defendant "knowingly and willfully" failed to disclose or fully disclose a public record that Plaintiff was entitled to. In determining whether Defendant acted "knowingly and willfully," it is critical to establish the chronology of Defendant's disclosures of records once Plaintiff filed a Complaint on December 20, 2017.

Following the initial MPIA Requests, dated September 5, 2017 and November 10, 2017, Defendant delivered two Denials, dated October 5, 2017 and November 28, 2017. On December 20, 2017, Plaintiff hired counsel and filed a Complaint in the Circuit Court for Baltimore City. On February 23, 2018, Defendant produced 73 pages of redacted documents. On March 1, 2018, Defendant produced 2 more pages of the aforementioned documents but with fewer redactions.

On July 3, 2018, Defendant produced its first Vaughn Index. On August 28, 2018, Judge Barry Williams ordered that Defendant produce a more comprehensive Vaughn Index. In response to Judge Williams' Order, on October 15, 2018, Defendant produced a second Vaughn Index. On the same date, October 15, 2018, Defendant produced 1,021 pages of redacted documents. On December 14, 2018, Defendant produced a third Vaughn Index and nearly 10,000 documents to Plaintiff. Given the aforementioned timeline, it is apparent that Defendant had the capability of producing documents responsive to Plaintiff's MPIA Requests. The productions that followed litigation are indicative of Defendant's knowing and willful behavior to deny Plaintiff's MPIA Requests for documents it knew that Plaintiff would have been entitled to. While Defendant maintains that it withheld documents under both required and permissive exemptions, Defendant never attempted to provide Plaintiff any documents, even redacted, prior to Plaintiff filing a Complaint on December 20, 2017.

Accordingly, the Court finds that Plaintiff willfully and knowingly failed to disclose public records that Plaintiff was entitled to, and Plaintiff shall be awarded \$1,000 in statutory damages.

e. Disciplinary Action §4-362(e)

Pursuant to Maryland Code General Provision §4-362(e)(1), if the Court finds Defendant acted "arbitrarily or capriciously" in withholding the public records from Plaintiff, the Court shall send a certified copy of its finding to the appointing authority of the custodian. Upon receipt of the finding, the appointing authority shall take the disciplinary action that the circumstances warrant. *Id.* at §4-362(e)(2). In Maryland, few cases have developed a "general definition of arbitrary and capricious," but rather courts instead apply the standard to the case at hand. *Harvey v. Marshall*, 389 Md. 243, 299 (2005). In *Harvey*, the court states that arbitrary or

capricious decision-making “occurs when decisions are made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms.” *Id.* (discussing whether administrative agency decision was arbitrary and capricious in a child support case). While the facts in *Harvey* are clearly distinguishable, the guidance concerning arbitrary and capricious is applicable.

In this case, Defendant initially denied Plaintiff’s MPIA Requests, citing numerous exemptions to disclosure, but failed to identify with any specificity how the exemptions applied to the records sought. *See* Plaintiff’s Exhibit 2; Plaintiff’s Exhibit 4. Further, Defendant did not provide a single document in response to Plaintiff’s Requests. Plaintiff then hired counsel and filed a Complaint on December 20, 2017. Following the Complaint, sporadic series of documents were produced. At trial, through testimony by Ms. Robinson, she made the distinction that while the documents produced were not prohibited from disclosure by the MPIA and applicable law, they were not required to be disclosed either. Essentially, BCBSC defended its decision to change its position by turning over nearly 11,000 documents, while simultaneously maintaining that it had not broken the law to do so.

The Court believes that Defendant’s actions were the product of Defendant’s preference to interpret the MPIA Requests narrowly, or were calculated to deny complete access to responsive records in order to hide possible wrongdoings within the Baltimore City Public Schools. Therefore, Defendant failed to turn over or submit documents it knew to be responsive to the MPIA Requests, and only fashioned productions of documents when faced with the potential for litigation costs and proceedings. As such, the Court finds that Defendant acted arbitrarily and capriciously, and refers this matter to the appointing authority of the custodian to take appropriate action.

f. Legal Fees §4-362(f)

At the close of trial, Plaintiff argued that, should the Plaintiff “substantially prevail,” it should be awarded reasonable counsel fees and other litigation costs. In an effort to justify his hourly rates, as well as the totality of his invoices, Mr. Marder testified regarding his extensive legal experiences both as a trial attorney and representing clients on public records cases. He further testified that the reason his billable hours and fees were high is due to Defendants’ “fight everything” approach to this case. At every interval, Defendant put up roadblocks and obstacles requiring further motions and court intervention. At the conclusion of his testimony, Mr. Marder contended that his legal fees amounted to \$122,720.70, which did not include the trial fees.

In assessing whether Plaintiff has substantially prevailed, the Court looks to numerous factors, as articulated in *Kline v. Fuller*, 64 Md. App. 375, 388 (1985). The factors include: “(1) the benefit to the public, if any, derived from the suit; (2) the nature of the complainant’s interest in the released information; and (3) whether the agency’s withholding of the information had a reasonable basis in law.” *Id.* First, the Court finds there has been a substantial benefit to the public derived from the suit. The quality of education in Baltimore City Public Schools is of the utmost importance to the public. Following the filing of Plaintiff’s Complaint, Plaintiff is better equipped to inform the public regarding grade changing allegations within Baltimore City Public Schools, and address perpetual shortcomings in proficiency scores of the city’s youth. Second, Fox 45 is a media outlet with a concentrated focus, through its initiative “Project Baltimore,” in the performance of Baltimore City Public Schools and the quality of education students are or are not receiving. Accordingly, the nature of Plaintiff’s interest in the released information is critical in providing for well-informed reporting. Finally, the third prong in determining whether Plaintiff is entitled to attorneys’ fees is whether Defendant’s withholding of the information had

a reasonable basis in law. Initially, Defendant provided blanket exemptions as to why it was entitled to withhold relevant records, without further explanation or specificity. *See* Plaintiff's Exhibit 2; Plaintiff's Exhibit 4. Notably, Defendant produced zero documents following the initial two MPIA Requests, but subsequent to Plaintiff hiring counsel and filing a Complaint on December 20, 2017, Defendant slowly released documents. It is evidenced through Defendant's numerous productions of documents that its required and permissive exemptions did not actually preclude the production of responsive documents to Plaintiff's MPIA Requests. In an attempt to resolve the matter, as stated by Ms. Robinson, Defendant initiated disclosures of completely or substantially redacted records. As such, Defendant did not have a reasonable basis in law to deny Plaintiff's MPIA Requests in their totality without any specificity as to how the cited exemptions applied. Accordingly, the Court finds Plaintiff has substantially prevailed and the Court recognizes Mr. Marder as a highly qualified and competent lawyer whose fees were necessary and reasonable to respond to Defendant's obstructive approach to this case. Therefore, Defendant is ordered to pay Plaintiff's reasonable counsel fees of \$122,720.70 and court costs.

V. Conclusion

Accordingly, it is this 5 day of March, 2019, hereby

ORDERED that Defendant is enjoined from withholding the public records responsive to Plaintiff's two MPIA Requests; and it is further

ORDERED that Defendant shall conduct a global search for and produce all documents and emails relating to allegations of grade changing responsive to the two MPIA Requests beyond the Office of Staff Investigations; and it is further

ORDERED that Defendant shall provide the responsive materials in hard copy and email format to the Plaintiff; and it is further

ORDERED that the Court finds Investigation A is closed and Defendant shall produce all documents pursuant to Investigation A; and it is further

ORDERED that Defendant shall remove redactions from all responsive documents and investigation reports subject to personally identifying information; and it is further

ORDERED that Defendant acted knowingly and willfully and Defendant shall pay the statutory damages of \$1,000; and it is further

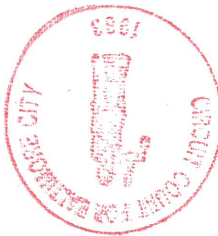
ORDERED that Defendant acted arbitrarily and capriciously and the Court will provide a certified copy of its finding to the appointing authority of the custodian; and it is further

ORDERED that Defendant shall pay Plaintiff's reasonable counsel fees totaling \$122,720.70 and court costs.

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JUDGE JEANNIE J. HONG P-1
original signature appears on original
document only

Notice to Clerk:

Please send copies to all parties.



MAIRIA BENTLEY, CLERK

Mairia Bentley

TRUE COPY
TEST